APPENDIX A

Jerry L. JOHNSON, Petitioner-Appellant,

v.

R. C. WRIGHT, Warden, et al.,
Respondents-Appellees.

No. 74-3017.

United States Court of Appeals,
Fifth Circuit.

March 13, 1975.

* * *

Appeal from the United States District Court for the Northern District of Georgia.

Before DYER, MORGAN and GEE, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

Appellant was convicted in Superior Court of Fulton County, Georgia, of armed robbery and of carrying a concealed and unlicensed pistol. He appeals the district court's denial of his petition for habeas corpus on two grounds:

(1) his warrantless arrest was not based on probable cause and violated his rights under the Fourth Amendment;

(2) the trial judge's charge to the jury on the weapons count violated his right to due process. For reasons explained below, we hold that his second contention is correct, and we therefore reverse the judgment of the district court.

I.

The challenged arrest of appellant occurred in the

following manner. In the early afternoon of January 7, 1972, Officer D. F. Lindstrom of the Atlanta Police Department received a call on his radio stating that there was a suspicious man at a grocery store in the neighborhood which Lindstrom was currently patrolling. Upon arriving at the store, Lindstrom interviewed several employees, who told him that they believed the man in question had participated in a robbery of the store two days earlier. They described him as a tall black male in his early twenties and wearing a floppy hat; they told Lindstrom that he had left the grocery in a red Ford Fairlane, with a jacked up rear end and with its license plate wired on. They indicated to him their belief that three other black males, one or two of whom were wearing hats, were also riding in the car; appellant was one of these passengers. Lindstrom passed this information along over the police radio, and began to patrol the neighborhood. Shortly, he and R. R. Wilbanks, another officer, both observed a car fitting the employees' description precisely and occupied by four black males. Wilbanks directed the driver of the Ford to pull over, and approached the car to ask for his driver's license. Upon observing a .22 caliber pistol on the front seat, Wilbanks ordered the men out of the car and immediately frisked them. By this time, two additional police vehicles had arrived at the scene, and Wilbanks placed each suspect in one of the cars. He next searched the car and found a sawed-off shotgun; the suspects were then taken to the police station, where they were held on the robbery and gun possession charges.

[1] Our analysis of this series of events begins with the proposition that although "searches conducted without the prior issuance of a warrant are, for the most part,

per se unreasonable, Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), there are a few clearly delineated exceptions to the warrant requirement of the Fourth Amendment." United States v. Anderson, 500 F.2d 1311, 1315 (5th Cir. 1974). In addition, we do not deal here with an indivisible process but with five conceptually distinct stages of the search and arrest, each one of which must satisfy constitutional standards.

[2] First, there can be no question that the officers were justified in stopping the car. Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), United States v. Rollerson, 491 F.2d 1209 (5th Cir. 1974). The car precisely fitted the description given by a store employee who alleged that its driver had been involved in a robbery two days previously.

Second, the officers clearly acted properly in arresting the driver when they ascertained that he fit the description given by the store employee. Indeed, appellant does not challenge this contention, and we repeat it only for purposes of logical coherence.

[3] Third, having reason to believe at least one of the car's occupants might have committed armed robbery, and seeing a pistol on the front seat of the vehicle, the officer acted reasonably in ordering the occupants out to be frisked for other weapons. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), United States v. Rosenberg, 458 F.2d 1183 (5th Cir. 1972).

[4, 5] Fourth, having arrested the driver, the police acted properly in searching the car itself for evidence pertaining to the crime. This warrantless search was proper because the officers had probable cause to believe they would find evidence pertaining to the crime, Dyke

v. Taylor Implement Mfg. Co., 391 U.S. 216, 88 S.Ct. 1472, 20 L.Ed.2d 538 (1968), and because they were dealing with a temporarily stopped automobile, a search of which is justified on the basis of exigent circumstances, *see* Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). Naturally, they could not safely and effectively search the vehicle unless it was empty of all passengers, and they therefore acted reasonably in detaining the passengers outside the car. Nor did they act improperly in segregating the passengers in separate cars for the duration of the search; the police had good reason to suspect that these men might be dangerous and might have been involved in a criminal offense. In segregating them, the police reduced any chance that the passengers would confer with each other as to alibis, or that they might endanger the officers.

[6] Finally, when Wilbanks discovered a sawed-off shotgun in the car, he acted properly in arresting all the occupants, since possession of such a weapon constitutes both a federal and a state offense.

Probable cause existed to arrest appellant, and his Fourth Amendment rights were not violated.

II.

At appellant's trial, the judge charged the jury in part:

> Now, this defendant has been charged . . . with the possession of a pistol without a license, and with the carrying of a pistol outside of his home, not in an open manner. I instruct you that the State has proven a prima facie case of the possession of a pistol in this case by someone who is alleged by the Grand Jurors here to have been the defendant, which the defendant denies. And when a prima facie case is made, I charge

> you that *it is then upon the defendant,* if you believe the defendant to be the person alleged to have committed this crime, *to show that he did possess a license to carry the weapon alleged to have been carried by the State. The defendant is doing so must prove that a license existed to carry the weapon in order to overcome the prima facie showing of the violation of this law by the State.* (Emphasis supplied.)

[7] On appeal, the Georgia Supreme Court found this to be a proper charge on violations of Ga.Code Ann. § 26-2903[1] and to contain no constitutional errors. Johnson v. State, 230 Ga. 196, 196 S.E.2d 385 (1973). We hold that the trial court's instruction violated appellant's right to due process in permitting the jury to infer that his pistol was unlicensed from evidence that he possessed one, and also in shifting to him the burden of proof on an essential element of the offense.

In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970) established that the due process clause of the Fourteenth Amendment requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime. . . ." However, the Supreme Court has never decided whether this principle applies to the area of evidentiary presumptions and inferences. For example, in Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), the Court struck down a statutory presumption that possession of marijuana, unless satisfactorily explained, was sufficient to prove that the defendant knew that the marijuana had

1. The statute provides:

> A person commits a misdemeanor when he has or carries on or about his person outside of his home, automobile or place of business any pistol or revolver, whether concealed or not, for which he has not obtained a license from the ordinary of the county in which he resides.

been illegally imported. Concluding that any given marijuana might have been grown domestically, and that a user was unlikely to be aware of its origin, the Court stated that an inference is,

> "irrational" or "arbitrary," and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. 395 U.S. at 36, 89 S.Ct. at 1548.

The Court added in a footnote that since the challenged inference did not satisfy the "more likely than not" standard, it "need not reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use." *Id.* n. 64. Likewise, in Turner v. United States, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970), the Court left the issue unresolved in dealing with the constitutionality of a jury instruction that it might infer from possession of heroin and cocaine that the defendant knew the drugs to have been illegally imported. The Court simply held the heroin inference valid and the cocaine inference invalid, whether judged by the more likely than not standard or the beyond a reasonable doubt standard (*i. e.* the evidence necessary to invoke the inference is sufficient to permit a rational juror to find the inference beyond a reasonable doubt.) Finally, in Barnes v. United States, 412 U.S. 837, 843, 93 S.Ct. 2357, 2361, 37 L.Ed.2d 380 (1973), the Court ruled that, "if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard . . . as well as the more-likely-than-not standard, then it clearly accords with due process."

The inference here involved, that from proof of the defendant's possession of a pistol the jury may conclude that the pistol is unregistered, is clearly violative of due process by either standard. A more arbitrary and unreasonable conclusion can scarcely be imagined, since it is not even more likely than not that a given pistol will be unregistered.

[8] Additionally, the charge is unconstitutional because it shifts the burden of proof of an essential element of the crime to the defendant. Of course, the state always bears the burden of proof in a criminal trial, and any such shift renders the trial fundamentally unfair. Smith v. Smith, 454 F.2d 572 (5th Cir. 1971).

This does not mean, of course, that permissible inferences which satisfy the more likely than not and the reasonable doubt standards violate due process. For example, in Dyer Act[2] cases, the jury may infer from unexplained possession of a recently stolen auto that the defendant knew it to be stolen. There are two crucial distinctions between such an inference and the one involved here.

First, at issue under the Dyer Act is knowing possession of stolen property; "[k]nowledge and intent, because of their nature, must largely be proved by circumstantial evidence." Jackson v. United States, 330 F.2d 679, 681 (8th Cir. 1964). Therefore, once the government has proved that the defendant possessed the prohibited object, the jury may infer that he possessed it knowingly. Under the Georgia scheme, however, the state is not even required to prove possession of the prohibited object, an unlicensed pistol. Rather, the state is merely required to prove that the defendant

2. 18 U.S.C. § 2312.

possessed any pistol. The inference relates not to the defendant's knowledge, but to the nature of the object possessed.

Second, the inference employed in Dyer Act cases is permissible; the jury may make the inference, but it is not required to do so. The burden of proof does not shift to the defendant; he may be acquitted without offering any evidence at all if the jury feels the government has not proved his guilt beyond a reasonable doubt. As we have noted, the Georgia inference goes further and impermissibly shifts the burden of proof to the defendant.

The judgment of the district court is reversed, and it is ordered to issue the writ, subject to the state's privilege to retry appellant.

Reversed and remanded.

* * *

Jerry L. JOHNSON, Petitioner-Appellant,

v.

R. C. WRIGHT, Warden, et al.,

Respondents-Appellees.

No. 74-3017.

United States Court of Appeals,

Fifth Circuit.

April 2, 1975.

Appeal from the United States District Court for the Northern District of Georgia.

Before DYER, MORGAN and GEE, Circuit Judges.

PER CURIAM:

It is ordered that the last two paragraphs of the opinion in this case, dated March 13, 1975, which read as follows:

> The judgment of the district court is reversed, and it is ordered to issue the writ, subject to the state's privilege to retry appellant.
>
> Reversed and remanded.

be stricken, and that the following two paragraphs be substituted in lieu thereof:

> It is no longer a bar to federal habeas relief that granting the writ will not result in petitioner's immediate release. Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968); Walker v. Wainwright, 390 U.S. 335, 88 S.Ct. 962, 19 L.Ed.2d 1215 (1968); Glazier v. Hackel, 440 F.2d 592 (9th Cir. 1971); Velasquez v. Rhay, 408 F.2d 9 (9th Cir. 1969); United States ex rel. Rybarik v. Maroney, 406 F.2d 1055 (3rd Cir. 1969); Rhodus v. Patterson, 404 F.2d 890 (10th Cir. 1968).

The judgment of the district court is therefore affirmed in part and reversed in part. The cause is remanded with instructions to issue the writ as to appellant's gun possession conviction.

It is further ordered that the mandate to be sent to the district court in this case be based on the revised version of the opinion rather than the opinion as originally submitted.

* * *

United States Court of Appeals

FIFTH CIRCUIT

April 28, 1975

TO ALL COUNSEL OF RECORD

Re: 74-3017—Jerry L. Johnson vs. R. C. Wright, Etc., Et Al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By /s/ BARBARA KREI
Deputy Clerk

cc: Mr. Philip S. Davi
Messrs. Joel M. Feldman
Lewis R. Slaton
Morris H. Rosenberg
Carter Goode
James H. Mobley, Jr.
Mr. Arthur K. Bolton
Mr. H. Allen Moye

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JERRY L. JOHNSON VS R. C. WRIGHT, WARDEN	CIVIL ACTION NUMBER 18116

JUDGMENT

The Court, Honorable NEWELL EDENFIELD United States District Judge, by order of this date having DENIED THE PETITION FOR WRIT OF HABEAS CORPUS,

JUDGMENT is hereby entered in favor of the respondent and against the petitioner.

Dated at Atlanta, Georgia, this AUGUST 20, 1973.

BEN H. CARTER, CLERK

BY: /s/ KAY BATES

Deputy Clerk

Filed and entered in
AUGUST 20, 1973
Clerk's Office this

BEN H. CARTER, CLERK

By: /s/ KAY BATES

Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JERRY L. JOHNSON vs. R. C. WRIGHT, Warden, Fulton County Correction and Rehabilitation Center, Alpharetta, Georgia	CIVIL ACTION NO. 18116

ORDER

Petitioner, a state prisoner incarcerated in the Fulton County (Georgia) Correction and Rehabilitation Center, was convicted in the Fulton County Superior Court of armed robbery and carrying an unlicensed and concealed weapon. The convictions were appealed to the Supreme Court of Georgia and affirmed by that court on February 22, 1973. Petitioner then filed an application in this court for the writ of habeas corpus after being permitted to proceed in forma pauperis. The application of petitioner was denied by this court because of his failure to seek habeas corpus in the state superior court under Ga. Code Ann. § 50-107 (Supp. 1972).

Pursuant to an order of this court dated May 23, 1973, the petitioner's case was reopened on his motion for leave to appeal the court's earlier denial. As pointed out by the petitioner in his motion, the exhaustion requirement of 28 U.S.C. § 2254 (1970) had been satisfied since in the petitioner's appeal to the Supreme Court of Georgia, the issues presented in the present case had been raised, considered and decided adversely to the

petitioner. Accordingly, the petitioner's motion for leave to appeal was denied, his case reopened, and the state ordered to show cause why the requested relief should not be granted. The state has now responded.

In his application the petitioner asserts that his arrest by state officials was unlawful, that he was subjected to an illegal lineup, the evidence of which should have been suppressed, and that the instructions given by the state trial judge to the jury which convicted him shifted the burden of proof from the state to the accused and thereby relieved the state of proving guilt beyond a reasonable doubt. The petitioner states that his conviction was obtained only in violation of his rights under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution and he requests an evidentiary hearing by this court to inquire into his claims. A hearing need only be held, however, if the factual determinations reached by the state are not supported by the record as a whole or where material facts were not adequately developed in the state court hearing. The court is satisfied that the proceedings in this case provide adequate support for each of the factual determinations reached by the state courts.

The Arrest

The petitioner claims that his arrest was unlawful because the arresting officer had not obtained a warrant. The petitioner asserts that the sole basis for his arrest was his presence in a suspicious car. The petitioner's claim is without merit.

The arrest was made after an officer responded to a call made by employees of a grocery store which had been robbed two days earlier. The employees informed

the officer that a man, described as a young black in his early twenties, approximately six feet tall, with a small Afro hairstyle and wearing a "flophat", had just left the store. The employees claimed that this man had been involved in the robbery. The employees described in detail the car the man entered after leaving the store. The other occupants of the car were described as three young blacks in their twenties. Since the officer had had personal knowledge of the robbery even prior to having answered the call, he posted a "lookout" for the car over his patrol car radio. Shortly thereafter another police officer, acting on the "lookout", stopped a car fitting the description. Upon asking the driver of the car for his driver's license, the officer observed a pistol lying on the front seat and the barrel of a shotgun protruding from under the driver's seat. The officer testified that he immediately backed away and ordered the four occupants to get out of the car. The petitioner had been in the back seat. The four men were taken into custody along with the weapons. The petitioner claims that the lack of a warrant and the failure of the police officer who posted the "lookout" to corroborate information given by an informant renders the arrest unlawful.

An arrest is lawful when the arresting officer has probable cause to suspect that a crime has been committed and that the person sought committed the crime. Here the officer who posted the "lookout" had personal knowledge that two days prior to the petitioner's arrest a robbery had occurred in the grocery store. On the day of the arrest the officer posted his "lookout" on the basis of information supplied by victims of the crime. This situation is clearly distinguishable from the case of an informant from the criminal milieu who merely

has knowledge of criminal activity. There is no need to establish the credibility of a victim. *Brown v. United States*, 365 F.2d 976, 979 (1966). However, it is necessary to show why the person giving the information has a basis for his knowledge. Here the fact that the informant was a victim of the crime which he claimed was committed by petitioner two days before was sufficient basis for the officer to post the lookout and make lawful a subsequent arrest.

The probable cause required for an arrest and that necessary to conduct a search are substantially different. Here, prior to making the arrest, the arresting officer had no basis on the information contained in the lookout to conduct a search of the car. *However, both the shotgun and the pistol were in plain view.* This is the testimony of the arresting officer who was the subject of cross-examination conducted by the petitioner's counsel in both the trial court and in a hearing on a motion to suppress. For this court to hold that the weapons were not subject to seizure would require a finding that the weapons were not in plain view and there is nothing in the record transcript of the state proceedings which could require such a result.

Illegal Lineup

The petitioner next contends that as a result of his arrest he became the subject of an illegal lineup and that the evidence therefrom should have been suppressed. In reviewing this claim the Supreme Court of Georgia ruled that since the petitioner had withdrawn his motion to suppress lineup testimony during the Superior Court's hearing on the motion, any objection to evidence obtained pursuant to the lineup was ex-

pressly waived. Furthermore, the court held that since it viewed the petitioner's arrest as lawful, the lineup evidence was not the fruit of an illegal arrest.

The Supreme Court of the United States and the Fifth Circuit Court of Appeals have recently held that waiver or abandonment of a constitutional guarantee is disfavored and will not generally be found absent the informed and intelligent choice of the accused. *Humphrey v. Cady*, 405 U.S. 504 (1972), and *Winters v. Cook*, 466 F.2d 1393 (5th Cir. 1972). Here there is nothing in the record transcript which would indicate that counsel obtained petitioner's informed consent prior to abandoning the motion to suppress. Thus there is no support for a finding that petitioner waived his right to contest the identification evidence obtained from the lineup. However, petitioner asserts only that the lineup was unlawful because his arrest was unlawful. Since this court has already stated that the arrest was lawful, it would follow that the lineup conducted pursuant to that arrest must also be held to have been lawful. The petitioner makes no allegation that the lineup was conducted unfairly, nor did he make such an allegation in the state courts. Accordingly, the relief sought on the basis of this ground must be denied.

Jury Instruction

The petitioner attacks the following instruction to the jury by the state trial judge:

> "I instruct you that the state has proven a prima facia [*sic*] case of the possession of a pistol in this case by someone. And when a prima facia [*sic*] case is made, I charge you that it is then upon the defendant, if you believe the defendant to be the person alleged to have committed this crime,

> to show that he did possess a license to carry the weapon alleged to have been carried by the State. The defendant in doing so must prove that a license existed to carry the weapon in order to overcome the prima facia [*sic*] showing of the violation of this law by the State."

The petitioner asserts that the instruction violated the Fifth and Fourteenth Amendments to the Constitution by shifting the burden of proof from the state to the petitioner and thereby relieving the state of proving the guilt of petitioner beyond a reasonable doubt. The petitioner further complains that the instruction denied him of a presumption of innocence and amounted to an expression of the trial court's opinion that petitioner's alibi offense was insufficient as a matter of law.

In support of its holding the Georgia Supreme Court cited its recent decision in *Ezzard v. Georgia*, 229 Ga. 465, _____ S.E.2d _____ (1972). There the Court said, "There is no merit in the appellant's contention that he was required to carry the burden of proof on the two misdemeanor charges. The State had the burden to show, and did show, that the appellant carried a pistol on his person, outside his home, not 'in an open manner and fully exposed to view.' Code Ann. § 26-2901 (Ga.L. 1968, pp. 1249, 1323). The appellant *in defense* had the privilege of showing that he had a license to carry the pistol. [Citations omitted.]" *Id.* at 465, 466.

The language cited from the *Ezzard* case and the jury instruction challenged in these proceedings are consistent with such federal decisions as *Williams v. United States*, 328 F.2d 256 (8th Cir. 1964);[1] *Jackson v.*

[1] The *Jackson* and *Williams* decisions are two of a long line of federal cases involving 21 U.S.C.A. § 174 which create a presumption of guilt where a defendant is shown to have or have

United States, 330 F.2d 679, 681-682 (8th Cir. 1964). The instruction merely pointed out to the jurors that the prosecution's evidence had established a prima facie case and that the defendant could rebut such evidence by showing that he had a license to carry the weapon. Indeed, the challenged instruction proceeded to point out to the jurors:

> "As I have instructed you and as you have observed here, the defendant contends, however, that he was not present and thus could not have been the person allegedly in the unlawful possession of a pistol and possessing a pistol not in an open manner." (Tr. 171.)

Thus the damage, if any, to the defendant's alibi defense in this instruction appears negligible. Moreover, when the text of the jury instructions is read as a whole

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had possession of narcotics. According to the statute, this presumption may be explained away by the defendant. The Supreme Court, as early as 1925, held that the presumption so created was constitutionally sound. Yu Hem v. United States, 268 U.S. 178, 182 (1925). *See* Turner v. United States, 396 U.S. 398 (1970).

it does not appear that the defendant suffered any prejudice.[2]

For the foregoing reasons, petitioner's application for the writ of habeas corpus is DENIED.

IT IS SO ORDERED.

This 20 day of August, 1973.

/s/ NEWELL EDENFIELD
NEWELL EDENFIELD
United States District Judge

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[2] With regard to the petitioner's alibi defense, the trial court instructed the jurors in the following manner:

"Now in this case the defendant has entered a defense which is called alibi. An alibi is a defense involving the possibility, or that is to say, the impossibility of the defendant's presence at the scene; that is, it is his position that he was not at the scene of the offense at the time of its alleged commission.

"I charge you that any evidence whatsoever of alibi is to be considered on the general case with the rest of the testimony and if a reasonable doubt of guilt be raised by the evidence as a whole, the doubt must be resolved in favor of the innocence of the accused." (Tr. 169.)

APPENDIX C

IN THE SUPREME COURT OF GEORGIA

Decided: FEB. 22, 1973

27671. JOHNSON v. THE STATE.

1. The trial court did not err in overruling the motion to suppress evidence on the grounds of illegal arrest, search and seizure.

2. The shotgun involved in the robbery was properly admitted into evidence.

3. The denial of the motion for mistrial was not erroneous.

4. Overruling of the motion to dismiss the misdemeanor pistol charges and the charge to the jury on this subject were proper.

5. The trial court correctly refused to give the charge on guilt or innocence requested by the appellant.

6. The enumeration based on the failure to charge on the unreliability of eyewitness identifications is without merit.

GRICE, Presiding Justice. Jerry Lee Johnson was indicted and tried for the offenses of armed robbery and carrying a concealed and unregistered pistol in the Superior Court of Fulton County. He appeals from the judgments of conviction and sentences of ten years for the armed robbery and one year each on the pistol charges.

1. The appellant contends that the trial court erred in overruling his motion to suppress evidence because evidence used against him was obtained when he was illegally arrested, searched and held in custody without a warrant, probable cause or lawful justification.

The transcript of record reveals that when an Atlanta police officer answered a call at a grocery store he was told by employees there that a black male in his twenties had just left the store in a red Fairlane automobile, jacked up in the rear with its license tag wired on and dangling, occupied by three black males about the same age, one of whom wore a "flop hat". The employees told the officer they believed the man had been involved in a robbery of the store two days earlier and also that they recognized the car as having been used in this holdup.

The officer testified that he knew personally that the store had been robbed, so acting on this information he placed a "look-out" over the police radio for the described car. Relying on this "look-out", another police officer stopped a car fitting the description. The appellant was in the back seat. All four men were taken into custody along with a loaded pistol, which was lying on the front seat between the two occupants, and a loaded shotgun with a sawed off butt and barrel, which was protruding from under the front seat.

The appellant urges that this constituted an unlawful arrest because the officer had not obtained a warrant and the corroboration requirements for information obtained from a confidential informant had not been met; that certain lineup evidence should be suppressed because the arrest was illegal; and that the search of the car during which the weapons were found was likewise illegal.

There is no merit in these contentions.

(a) The crucial question is whether the knowledge of the related facts and circumstances gave the police officers here probable cause and reasonable grounds to believe that the appellant had committed an offense. If it did, the arrest, even without a warrant, was legal;

the subsequent search of the car and seizure of the loaded weapons were validly made incident to a lawful arrest; and the motion to suppress was properly overruled.

It is the function of the court to determine if the facts upon which the officer acted would warrant a man of reasonable caution to believe that an offense had been committed. See in this connection Draper v. United States, 358 U.S. 307, 310, 79 SC 329, 3 LE2d 327; Beck v. Ohio, 379 U.S. 78, 91, 85 SC 223, 13 LE2d 142; *Peters v. State*, 114 Ga. App. 595 (152 SE2d 647).

The source of the information here was not a confidential informant, whose reliability needed to be substantiated, but rather the victims of the robbery themselves. However, the fact that an automobile and its occupants exactly matching the detailed description given the officer was spotted within the immediate area shortly thereafter itself serves as corroboration of the information given. Moreover, the reasonable cause necessary to support an arrest does not demand the same strictness of proof as proof of guilt upon the trial. *Strauss v. Stynchcombe*, 224 Ga. 859, 865 (165 SE2d 302).

In our view, the information upon which the officers acted here was sufficient to sustain the arrest of the appellant without a warrant.

(b) Since we have ruled that the appellant's arrest was legal his contention that there was an illegal search of the car in which he was riding cannot be sustained. Moreover, since the weapons were in plain sight no illegal search was involved here.

(c) The appellant's objection to the trial court's

failure to suppress certain lineup evidence is likewise invalid.

The transcript of the hearing on the motion to suppress discloses that appellant's counsel withdrew his motion to suppress the identification testimony after the court ruled that the appellant had knowingly and intelligently signed a waiver of lineup. Therefore, any objection to this evidence has been expressly waived, and since the appellant's arrest was lawful the lineup evidence is not the fruit of an illegal arrest as contended.

2. The appellant next urges that the trial court erred in admitting the shotgun into evidence because it was not connected to him, was prejudicial, and had been illegally seized.

This argument cannot be sustained.

The owner of the store robbed testified that the appellant was carrying a pistol and another one of the robbers had a shotgun, which he described; and that the shotgun produced in court "looks like the exact gun I saw the day of the robbery and at Police Headquarters." This was the shotgun found in the car with the appellant and his companions when they were apprehended.

"Under all the evidence and circumstances it was for the jury to determine the fact as to whether or not the weapons introduced in evidence were the same weapons used by the accused and his accomplices in perpetrating the robberies for which he was on trial. [Citations]" *Clements v. State*, 226 Ga. 66 (172 SE2d 600).

The shotgun was properly admitted into evidence and was not prejudicial to the appellant, as contended. For the reasons stated in Dvision 1 (b) above, the search of the car and seizure of the shotgun were not illegal.

3. Because of the rulings made in Division 1 and 2 above, the appellant's enumerations of error concerning admission into evidence of a lineup photograph and the denial of his motion for mistrial based upon the admission into evidence of the shotgun and the lineup photograph cannot be sustained.

4. The appellant's enumerations that the trial court erred in overruling his motion to dismiss the misdemeanor pistol charges, and that the charge to the jury on the subject was improper, are not meritorious.

(a) The conviction for carrying a concealed weapon was clearly supported by the evidence.

The owner of the robbed store testified that while he was talking on the telephone he saw the appellant and another man outside the store; that while he was still talking on the telephone one of them hit him "in the bend of the leg with something" and he fell down; that when he looked up he saw the appellant with a pistol; and that the appellant then told him to "Get off the phone" and give him the money in the cash register and his billfold, and said "Don't move", and the robbers left the store.

The only logical inference to be drawn by the jury from this evidence was that the pistol was concealed by the appellant on his person until the time that the actual perpetration of the robbery began.

(b) The appellant's contentions that an impermissible burden was placed upon him to prove that he had a license to carry the pistol, and that the trial court erred in charging the jury that he had to rebut the burden of proof in regard to the pistol charge, have been decided adversely to him in the recent decision of *Ezzard v. State*, 229 Ga. 465 (3) (SE2d).

This court there said: "There is no merit in the appellant's contention that he was required to carry the burden of proof on the two misdemeanor charges. The State had the burden to show, and did show, that the appellant carried a pistol on his person, outside his home, not 'in an open manner and fully exposed to view.' Code Ann. § 26-2901 (Ga. L. 1968, pp. 1249, 1323). The appellant *in defense* had the privilege of showing that he had a license to carry the pistol. [Citations]."

What we said there is equally applicable to the evidence and charge to the jury given by the court in the instant case.

5. The appellant protests the trial court's refusal to give a requested charge to the jury from *Patrick v. State*, 75 Ga. App. 687 (2) (44 SE2d 297), to wit: "Where the facts in evidence and all reasonable deductions therefrom present two theories, one of guilt and the other consistent with innocence, the justice and humanity of the law compel the acceptance of the theory which is consistent with innocence. *Davis v. State*, 13 Ga. App. 142 (1) (78 SE 866)."

Although this written request to charge was not included in the record, the substance of the charge appears in the transcript in colloquy between the trial judge and counsel for the appellant.

It should be noted that the *Patrick* case, and others following it, involve circumstantial evidence where the State must prove facts that not only are consistent with the hypothesis of the guilt of the accused, but exclude every other reasonable hypothesis. See, e.g., *Carr v. State*, 119 Ga. App. 540, 544 (167 SE 707), and cases cited.

Here however, the appellant was identified by victims of the robbery both at a lineup and in court. The only theory consistent with his innocence was the defense of alibi and this was completely and adequately charged, as requested, by the trial court. The court also fully charged on reasonable doubt. Therefore, the denial of the requested charge does not constitute reversible error.

6. The appellant's final enumeration, that the trial court erred in failing to charge his written request containing language from Wade v. United States, 388 U.S. 218, SE , LE2d , concerning the unreliability of eyewitness identifications, is not maintainable.

The requested charge is not included in the record and the colloquy contained in the transcript does not reflect the substance of it, as contended by the appellant. All that appears is the trial judge's response to counsel's objection to its denial, that "Your request No. 5 was denied and that had to do in general with the testimony of a witness in which you cited United States versus Wade."

Counsel for appellant made no effort to perfect the record as provided in Code Ann. § 6-805 (f) (Ga. L. 1965, pp. 18, 24), and nowhere in his brief or argument has he stated what language he contends the court should have charged the jury. Since the trial judge fully charged the jury in regard to determining the credibility of witnesses and on reasonable doubt, this enumeration is without merit. *Geter v. State*, 226 Ga. 236 (6) (173 SE2d 680) (One Justice dissenting on other grounds).

Judgment affirmed. All the Justices concur.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-

R. C. WRIGHT, Warden, Et al.,
Petitioner,

vs.

JERRY L. JOHNSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I, Lewis R. Slaton, hereby certify that I am a member of the bar of the Supreme Court of the United States and that I have served copies of the Petition for Writ of Certiorari in the above-styled case on Counsel for the Respondent by depositing the same in the United States mail, first class postage prepaid, addressed as follows:

Phillip S. Davi, Esq.
P. O. Box 8182
Atlanta, Georgia 30306

All parties required to be served have been served this 3rd day of July, 1975.

Lewis R. Slaton

Fulton County Courthouse
Third Floor
Atlanta, Georgia 30303

LEWIS R. SLATON
District Attorney,
Atlanta Judicial Circuit